

<b>PRE-APPEAL BRIEF REQUEST FOR REVIEW</b>		Docket Number (Optional) <b>NAI1P306/03.026.01</b>			
I hereby certify that this correspondence is being e-filed with the USPTO  on <b>March 21, 2008</b>  Signature <u>/Dana Chan/</u>  Typed or printed name <u>Dana Chan</u>		Application Number <b>10/612,550</b>	Filed <b>07/01/2003</b>		
		First Named Inventor <b>David Ronald Harrison</b>			
		Art Unit <b>2152</b>	Examiner <b>Lee, Philip C.</b>		
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p> <p>I am the</p> <table style="width: 100%;"><tr><td style="width: 50%; vertical-align: top;"><p><input type="checkbox"/> applicant/inventor.</p><p><input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)</p><p><input checked="" type="checkbox"/> attorney or agent of record.      <b>41,429</b> Registration number _____</p><p><input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____</p></td><td style="width: 50%; vertical-align: top;"><p style="text-align: center;"><u>/KEVINZILKA/</u> Signature <b>Kevin J. Zilka</b> Typed or printed name <b>408-971-2573</b> Telephone number <b>March 21, 2008</b> Date</p></td></tr></table> <p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p>				<p><input type="checkbox"/> applicant/inventor.</p> <p><input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)</p> <p><input checked="" type="checkbox"/> attorney or agent of record.      <b>41,429</b> Registration number _____</p> <p><input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____</p>	<p style="text-align: center;"><u>/KEVINZILKA/</u> Signature <b>Kevin J. Zilka</b> Typed or printed name <b>408-971-2573</b> Telephone number <b>March 21, 2008</b> Date</p>
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<p><input checked="" type="checkbox"/> *Total of <u>1</u> forms are submitted.</p>					

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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## REMARKS

The Examiner has rejected Claim 28 under 35 U.S.C. 101 as being directed to non-statutory subject matter. More specifically, the Examiner has stated that “[a] system’ comprising a network analyzer (i.e., software) does not include any functional structure of a system (i.e. an apparatus)” and “is considered [a] program per se, which is not one of the categories of statutory subject matter.” Additionally, the Examiner has stated that “[a]ccording to page 1, lines 13-14 of the specification, ‘a network analyzer’ is a program (i.e., software)” and “[a] system’ as claimed in claim 28 appears to be directed to a machine (i.e. system) not processes of a method.” The Examiner has further stated that “[t]herefore, [claim 28] is lacking the necessary structural/mechanical element to be a system (i.e. hardware) as [the] claim appears to be directed solely to software processes (i.e., network analyzer).”

Applicant respectfully disagrees and notes that applicant specifically claims a “computer-implemented system for capturing and selectively analyzing data frames transmitted between stations in a communications network utilizing tunneling protocols” (emphasis added), as claimed by applicant.

The Examiner has rejected Claim 29 under 35 U.S.C. 102(e) as being unpatentable over Pathak et al. (U.S. Patent Publication No. 2003/0014128). Additionally, the Examiner has rejected Claims 1-2, 4, 7, 9, 14-15, 17, 20, 22, and 28 under 35 U.S.C. 103(a) as being unpatentable over Sirbu (U.S. Patent No. 7,062,680), in view of Hippelainen (U.S. Patent Publication No. 2002/0078384), and further in view of Pathak. Applicant respectfully disagrees with such rejections.

With respect to independent Claim 29, the Examiner has relied on paragraphs [0019] and [0022] from the Pathak reference to make a prior art showing of applicant’s claimed “enabling a tunnel analysis based on the user input.”

Applicant disagrees and respectfully points out that the above reference excerpts from Pathak relied on by the Examiner merely teach that “[u]pon receiving the data packets, the core... analyzes the data packets and captures certain data from the data packets” (Pathak - paragraph [0019]). In addition, the reference excerpts from Pathak teach that “the user provides constraints which specify

capture of information from particular data packets satisfying the provided constraints, as well as the measures, levels of granularity, and constraints associated therewith” (Pathak - paragraph [0022]).

However, merely teaching that a core analyzes data packets, and that a user provides constraints which specify capture of information from particular data packets, as in Pathak, does not teach “enabling a tunnel analysis based on the user input” (emphasis added), as claimed by applicant.

In the Office Action mailed 12/21/2007, the Examiner has argued that “Pathak further teach[es] by specifying the constraint, it enables capture of information from particular data packet[s] satisfying the specified constraints ([0022])” and that “[t]his means capture of information, which is part of the analyzing of the GPRS tunneling packets is made possible based on the user specified constraints (i.e., enabling the tunnel analysis based on user input).”

Applicant respectfully disagrees and again notes that merely “provid[ing] constraints which specify capture of information from particular data packets satisfying the provided constraints” (emphasis added), as in Pathak, does not teach “enabling a tunnel analysis,” much less “enabling a tunnel analysis based on the user input” (emphasis added), as specifically claimed by applicant.

Also with respect to independent Claim 29, the Examiner has relied on paragraphs [0020] and [0021] in Pathak to make a prior art showing of applicant’s claimed technique “wherein the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling.”

Applicant respectfully asserts that such excerpts simply disclose “preprocess[ing] the raw data captured at the core” (paragraph [0020]) and that “the user can provide constraints which specify capture of information from particular data packets satisfying the provided constraints” (paragraph [0021]). Clearly, simply preprocessing raw data which is captured from data packets matching user provided constraints, as in Pathak, fails to meet applicant’s claimed technique “wherein the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling” (emphasis added), as claimed.

In the Office Action mailed 12/21/2007, the Examiner has simply repeated the arguments noted above, namely that “Pathak teaches packets such as GPRS tunneling protocol packet data

([0017]) are analyze[d] and capture[d] based on user inputted constraint[s] ([0021] and [0022])” and that “[t]his means that analyze and capture are imposed, depending on specified constraints (i.e., conditionally performed).” Applicant respectfully disagrees and asserts that simply disclosing that “the user provides constraints which specify capture of information from particular data packets satisfying the provided constraints” (paragraph [0022], and substantially the same language in paragraph [0021] - emphasis added), in addition to merely mentioning GPRS tunneling protocol packet data (paragraph [0017]), fails to meet applicant’s claimed technique “wherein the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling” (emphasis added), as claimed.

Additionally, with respect to independent Claims 1, 14 and 28, the Examiner has relied on paragraphs [0021] and [0022] from the Pathak reference to make a prior art showing of applicant’s claimed technique “wherein the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling” (see this or similar, but not necessarily identical language in the aforementioned independent claims).

Applicant respectfully asserts that the excerpts from Pathak relied upon by the Examiner merely teach that “the user provides constraints which specify capture of information from particular data packets satisfying the provided constraints” (paragraph [0022], and substantially the same language in paragraph [0021] - emphasis added). However, merely teaching that the user can provide constraints which specify capture of information from particular data packets, fails to even *suggest* that “the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling” (emphasis added), as claimed by applicant.

In the Office Action mailed 12/21/2007, the Examiner has again argued that “Pathak teaches packets such as GPRS tunneling protocol packet data ([0017]) are analyze[d] and capture[d] based on user inputted constraint[s] ([0021] and [0022])” and that “[t]his means that analyze and capture are imposed, depending on specified constraints (i.e., conditionally performed).”

Applicant respectfully disagrees and notes that the additional excerpts relied on by the Examiner merely teach that “wireless content switch 108 can receive GPRS tunneling protocol packet data from serving node 106, and can process the GPRS tunneling protocol packet data to perform additional functionality prior to transmitting the packet data to gateway node 110”

(Paragraph [0017] – emphasis added). However, merely disclosing receiving and processing GPRS tunneling protocol packet data, in addition to disclosing that the user can provide constraints which specify capture of information from particular data packets (as noted above), fails to even *suggest* that “the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling” (emphasis added), as claimed by applicant.

Applicant further notes that the prior art is also deficient with respect to the dependent claims. With respect to dependent Claim 9 et al., the Examiner has relied on paragraphs [0016], [0021] and [0022] from the Pathak reference to make a prior art showing of applicant’s claimed technique “wherein the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling based on user input.”

Applicant respectfully asserts that the excerpts from Pathak relied upon by the Examiner merely teach that “[the w]ireless content switch... can receive GPRS tunneling protocol format packet data from [the] gateway node,” and that the switch “can determine additional processing that may be required based upon the mobile station... the type of content in the packet, priority data, quality of service data, multicasting functionality, or other suitable functions” (paragraph [0016] - emphasis added). In addition, the excerpts teach that “the user can provide constraints which specify capture of information from particular data packets satisfying the provided constraints” (paragraph [0021] - emphasis added).

However, determining additional processing based on a mobile station, type of packet content, priority data, quality of service data, and multicasting functionality, in addition to specifying capture of information based on user constraints, fails to even *suggest* a technique “wherein the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling,” much less a technique “wherein the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling based on user input” (emphasis added), as claimed by applicant.

In the Office Action mailed 12/21/2007, the Examiner has again argued that “Pathak teaches packets such as GPRS tunneling protocol packet data ([0017]) are analyze[d] and capture[d] based on user inputted constraint[s] ([0021] and [0022])” and that “[t]his means that analyze and capture are imposed, depending on specified constraints (i.e., conditionally performed).”

Applicant respectfully disagrees and notes that such excerpts simply disclose determining additional processing based on a mobile station, type of packet content, priority data, quality of service data, and multicasting functionality, in addition to receiving and processing GPRS tunneling protocol packet data, and that the user can provide constraints which specify capture of information from particular data packets, which fails to even *suggest* a technique “wherein the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling,” much less a technique “wherein the analyzing is conditionally performed for one or more types of tunnels associated with the tunneling based on user input” (emphasis added), as claimed by applicant.

Additionally, with respect to dependent Claim 12 et al., as rejected under 35 U.S.C. 103(a) as being unpatentable over Sirbu, Hippelainen, Pathak, and Applicant Admitted Prior Art (AAPA), the Examiner has argued that Page 3, second paragraph, item 15 in Figure 1A, and Table 3 of AAPA meet applicant’s claimed technique “wherein the IP protocol interpreter is re-executed to accommodate the tunneling.”

Applicant respectfully asserts that Page 3, second paragraph and table 3 of applicant’s specification only discloses an “order in which...EPIs are called.” Further, item 15 in Figure 1A only shows a frame resulting from an analysis (see Page 3, paragraph 1 of the specification). Clearly, only mentioning that EPIs are called based on an order fails to specifically teach that an “IP protocol interpreter is re-executed to accommodate the tunneling” (emphasis added), as claimed.

In the Office Action mailed 12/21/2007, the Examiner has argued that “AAPA teaches calling (i.e., executing) the EPIs (i.e., IP protocol interpreters) in the order shown in Table 3 (page 3, 2<sup>nd</sup> paragraph of the specification)” and that “[a]ccording to Table 3, EPIs are called for in the order of ETHER (first), IP (2<sup>nd</sup>), TCP (3<sup>rd</sup>), etc.” Additionally, the Examiner has argued that “[t]his means the EPIs are called to analyze ETHER, and called again [to] analyze IP and so on according to the order of Table 3 (i.e., IP protocol interpreters are re-executed for analysis).”

Applicant respectfully disagrees and again notes that Table 3 of AAPA merely discloses an “order in which...EPIs are called.” However, merely mentioning that EPIs are called based on an order fails to specifically teach that an “IP protocol interpreter is re-executed to accommodate the tunneling” (emphasis added), as claimed.